A **YONG TSHU KHIN & ANOR v. DAHAN CIPTA SDN BHD & ANOR AND OTHER APPLICATIONS**

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
ZABARIAH YUSOF FCJ
B HASNAH MOHAMMED HASHIM FCJ
HARMINDAR SINGH DHALIWAL FCJ
RHODZARIAH BUJANG FCJ
[CIVIL APPLICATIONS NO: 08(RS)-3-08-2018(W), 08(RS)-6-08-2018(W), 08(RS)-7-08-2018(W), 08(RS)-12-10-2018(B),
C 08(RS)-13-11-2018(W), 08(RS)-14-11-2018(A) & 08(RS)-17-12-2018(W)]
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CONSTITUTIONAL LAW: *Courts – Federal Court – Review motions – Coram*
D *failure – Appointments of Federal Court Judges – Whether appointments could be collaterally challenged – Application of de facto doctrine – Whether doctrine preserves integrity of judicial decisions – Whether validity of appointments should have been raised during appeal – Whether de facto doctrine applies to constitutional appointments – Rules of the Federal Court 1995, r. 137*

E ***CONSTITUTIONAL LAW:*** *Courts – Federal Court – Review motions – Coram failure – Judge prepared minority judgment before retirement – Another judge in panel 'adopted' minority judgment of retired judge – Whether majority judgment stands independently of minority judgment – Whether judgment read and agreed upon by all judges in panel was judgment of court – Whether judgment pronounced*
F *by another judge in physical absence of judge signing judgment affected coram – Whether Federal Court obligated to provide written ground in all appeals – Whether failure to provide grounds amounted to coram failure – Whether Federal Court could abstain from answering leave question upon considering merits of appeal – Whether coram failure established – Rules of the Federal Court 1995, r. 137 – Courts of*
G *Judicature Act 1964, s. 78(1)*

There were seven review motions filed pursuant to r. 137 of the Rules of the Federal Court 1995 ('RFC') herein and all the motions raised a common point of coram failure in that the appointments of Tun Md Raus bin Sharif as the Chief Justice and of Tan Sri Zulkefli bin Ahmad Makinudin as the
H President of the Court of Appeal ('two judges') were respectively invalid. It was argued that the advice given by the outgoing Chief Justice, Tun Arifin bin Zakaria, to the Yang di-Pertuan Agong to appoint the two judges as additional judges of the Federal Court ('FC') was invalid because such advice may only be given by a sitting Chief Justice to take effect during his tenure,
I and that in any event, the two judges could not have occupied their respective

positions as Chief Justice and President of the Court of Appeal as additional judges of the FC on a proper interpretation of art. 122(1A) of the Federal Constitution. Accordingly, it was argued that Tun Raus was not entitled to empanel the FC panels which heard the appeals and, in any event, that the two judges were not entitled to sit in the cases.

The seven motions were: (i) motions 08(RS)-12-10/2018(B) and 08(RS)-13-11/2018(W) ('Yakin Tenggara motions'), which concerned the decision of the FC dated 10 October 2018. However, by the time the case came up for decision, Zulkefli PCA had resigned. The decision was split 3-1 with Ramly Ali FCJ delivering the decision of the majority and Balia Yusof FCJ for the minority. In delivering the minority judgment, Balia Yusof FCJ said 'The judgment as set out below was prepared by Tan Sri Zulkefli bin Ahmad Makinudin, the then President of the Court of Appeal, prior to his retirement. I concur with and adopt the judgment.' The applicants' complaint was that Balia Yusof FCJ was not entitled to adopt the 'judgment' of Zulkefli PCA who had already resigned at the material time. Accordingly, placing significant reliance on the case of *Bellajade Sdn Bhd v. CME Group Bhd & Another Appeal* ('*Bellajade*'), the appellants argued that the decision of the FC dated 10 October 2018 was bad and liable to be set aside (ii) motions 08(RS)-3-08/2018(W), 08(RS)-6-08/2018(W) and 08(RS)-7-08/2018(W) ('Yong Tshu Khin motions') wherein the panel delivering the FC decision consisted of Raus Sharif CJ, Hasan Lah FCJ, Azahar Mohamed FCJ, Balia Yusof Hj Wahi FCJ and Alizatul Khair Osman Khairuddin FCJ. The decision was read out by Azahar Mohamed sitting alone but the judgment was signed by Raus Sharif CJ. Hence, it was submitted that the panel was not of a duly constituted court and that Azahar Mohamed FCJ was not entitled to deliver the judgment sitting alone as it violated s. 78(1) of the Courts of Judicature Act 1964 ('CJA') which requires that where a judge is 'absent', the proceedings can continue provided that the number of judges in the coram is not less than two. The applicants also argued that (a) the FC did not have jurisdiction under s. 96(a) of the CJA to make the decision; (b) there was a breach of natural justice as the applicants were not heard on certain matters which were not in issue in the courts below and (c) the decision was erroneous; (iii) motion 08(RS)-14-11/2018(A) ('Tan Boon Lee's motion'), wherein the FC reversed the High Court and the Court of Appeal's concurrent findings that the applicant was not a vexatious litigant. The applicant complained that a breach of natural justice had been occasioned on account that the FC did not provide written grounds of judgment; and (iv) motion 08(RS)-17-12/2018(W) ('Tan Wei Hong's motion'), where the specific complaint was that there was coram failure on account that the FC, in a unanimous decision, did not consider at all the leave question posed in the case. In rebuttal, the respondents contended that the validity of the two judges' appointments could not be challenged collaterally and that, even if

A their appointments were deemed invalid, their decisions (both judicial or administrative) were saved by the '*de facto* doctrine'. In reply, the applicants acknowledged the existence of the said doctrine but argued that it did not apply to constitutional appointments.

Held (dismissing all review motions with costs)

B **Per Tengku Maimun Tuan Mat CJ delivering the judgment of the court:**

(1) The *de facto* doctrine exists to preserve the integrity of judicial decisions for at least one of two reasons (i) it insulates the *de facto* judge's decision from collateral attack. Otherwise, unsuccessful private litigants will reserve the point as an ammunition to attack the judge's lack of authority C as a ground to re-litigate their case or to have the outcome changed for the reason that the judge who heard their case was no judge at all. Doing so would be to put the prestige and integrity of justice and the justice system into jeopardy and disrepute; and (ii) even if a judge's appointment is set aside *de jure*, *ie*, his appointment is directly and D successfully assailed in proceedings against him, be it in *quo warranto* or other proceedings, all decisions made by him either judicially or administratively are saved – not so much to save the integrity of that judge *per se*, but to save the integrity of the judgment of the court. (para 20)

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(2) The challenge in these cases were clearly collateral because the validity of the appointments of the two judges was not raised before them during the hearing of the appeals proper. Neither was the argument raised by the applicants in separate proceedings. The two main conditions for the doctrine to apply were: (i) the judges whose appointments were assailed F are not mere intruders or usurpers but were holding office under some colour of lawful authority. The appointments of the two judges were made under the Federal Constitution, except that the propriety of such appointments was in issue. The two judges were therefore not usurpers in the sense of the word as there was some legal basis for their G appointments; and (ii) the *de facto* judge could not himself rely on it for his own protection. That was not the case here and as such, the application of the doctrine was not excluded. (paras 23 & 24)

(3) The *de facto* doctrine has always existed in Malaysian common law and constitutional and statutory provisions are merely declaratory of the H scope of its application. Therefore, there was no reason why the *de facto* doctrine is inapplicable to constitutional appointments. In that light, the applicants were not entitled to collaterally challenge the validity of the appointments of the two judges through these review motions. In any case, even if they were successful in that challenge, the decisions of the I two judges will continue to stand by virtue of the *de facto* doctrine. It follows that the common point in all the review motions failed. (paras 32 & 45)

(4) The case of *Bellajade*, relied on by the applicants in the Yakin Tenggara motions was concerned with the invalidity of the majority judgment whereas, in this case, the 'adoption' was of a minority judgment and the majority judgment still stood as valid, having been delivered by an uneven number of three judges. The primary provision which governs the continuation of proceedings, including the delivery of judgment, notwithstanding the absence of a judge, is s. 78 of the CJA. Upon a purposive construction of s. 78(2) of the CJA, the majority judgment stands independently of the minority judgment and it represented the views of 'the three remaining judges' and hence, it was valid. As such, there was no merit in the Yakin Tenggara motions and they were accordingly dismissed with costs. (paras 50, 51, 62 & 63)

(5) The word 'absence' in r. 63(2) of the RFC does not share the same meaning as the word 'absence' in s. 78(1) of the CJA. Section 78(1) is a deeming provision which saves the disruption of the panel which was originally properly constituted under s. 74. Rule 63 of the RFC, in turn, refers to the manner in which a judgment is to be pronounced. It is a procedural provision applicable to both ss. 74 and 78 of the CJA. A judgment shall be pronounced in open court even if a judge is absent so long as the coram is substantively constituted (s. 74) or is deemed validly constituted (s. 78). Thus, whether it is the full coram or a duly deemed constituted coram, r. 63 is the procedure on how such judgment of the panel is to be delivered. 'Absence' in r. 63 must therefore be construed to mean mere physical absence and as such, so long as the substantive coram of the court is validly and legally constituted, or deemed to be validly and legally constituted at the time the judgment is delivered, the judgment may be pronounced in the physical absence of that judge by another judge or a registrar. (paras 70, 71 & 73)

(6) Ultimately, in an appellate court setting, the judgment delivered by the judge which has been read and agreed upon by the other existing judges in the panel is the judgment of the court. Therefore, Azahar Mohamed FCJ sitting alone to read out the judgment of Raus Sharif CJ was justified under r. 63. The four other judges in the panel still legally existed when the decision was delivered. As such, there was no legal incapacity affecting the coram to bring into effect s. 78(1) of the CJA. (paras 74 & 75)

(7) Motions for review are not meant to operate as another tier of appeal. It is confined to the very specific purpose to prevent a manifest miscarriage of justice. A subsequent panel of the court need not have to examine its prior decision with a microscope to confirm that parties were accorded every opportunity to be heard on every microscopic point. Suffice to say that parties are allowed to canvass each point

striking to the substance of the case and that the court, in applying its own judicial mind and resources, arrives at a decision on the law and on the facts of the case as submitted. The court found there was no reason to review the FC judgment dated 9 July 2018. Five very lengthy leave questions were framed and the court considered them and dealt with them accordingly. The Yong Tshu Khin motions did not cross the threshold of review under r. 137 of the RFC and they are accordingly dismissed with costs. (paras 78, 81 & 84)

(8) The FC does not typically give written reasons for the dismissal or the grant of leave applications. Apart from the fact that the decisions of the lower courts were concurrent and that the FC had reversed it, the applicant in Tan Boon Lee's motion had not satisfied that there had been a substantial miscarriage of justice within the meaning of r. 137 of the RFC. The FC is the apex court and its decisions are not subject to appeal. Further, the submission that given the infrequency of such orders, it would be useful to have general guidelines on the issue for the future, did not reflect a serious miscarriage of justice. Therefore, no serious miscarriage of justice had been occasioned to the applicant such that the threshold of r. 137 of the RFC 1995 had been met. As such, Tan Boon Lee's motion was without merit. (paras 92, 95, 96, 98 & 99)

(9) Where the FC had granted leave, a subsequent panel of the court need not answer the leave question or questions posed if the circumstances do not require it. The court can, upon considering the merits of the appeal, decide that the appeal, being fact-sensitive, does not warrant its answer to the leave question or questions. It may also be the case that the court elects not to answer the question because, upon considering the merits of the appeal, the facts of the case do not actually relate to the questions of law so specifically framed. Tan Wei Hong's motion was found to be bereft of any merit. The judgment essentially dealt with appeals against decisions of the High Court and the Court of Appeal in respect of a striking out application. Such an interlocutory appeal naturally concerns the issue of discretion of the lower courts and necessarily involves issues of fact. It was the prerogative of the court not to answer or consider the leave question. Hence, the applicants in Tan Wei Hong's motion did not suffer any prejudice much less that the decision was bad on account of coram failure. Accordingly, the motion was dismissed with costs. (paras 104 & 107-109)

Bahasa Melayu *Headnotes*

Tujuh usul semakan difailkan menurut k. 137 Kaedah-kaedah Mahkamah Persekutuan 1995 ('KMP') dan kesemua usul membangkitkan perkara sama kegagalan koram bahawa pelantikan Tun Md Raus bin Sharif sebagai Ketua Hakim Negara dan Tan Sri Zulkefli bin Ahmad Makinudin sebagai Presiden Mahkamah Rayuan ('kedua-dua hakim') masing-masing, tidak sah. Dihujahkan bahawa nasihat yang diberi oleh Ketua Hakim Negara yang akan bersara, Tun Arifin bin Zakaria, kepada Yang di-Pertuan Agong untuk melantik kedua-dua hakim itu sebagai hakim tambahan Mahkamah Persekutuan ('MP') tidak sah kerana nasihat sedemikian hanya boleh diberi oleh Ketua Hakim Negara dalam jawatan untuk berkuat kuasa semasa masih menyandang jawatannya, dan walau apa pun, kedua-dua hakim itu tidak boleh memegang jawatan masing-masing sebagai Ketua Hakim Negara dan Presiden Mahkamah Rayuan sebagai hakim tambahan MP atas pentafsiran wajar per. 122(1A) Perlembagaan Persekutuan. Dengan itu, dihujahkan bahawa Tun Raus tidak berhak menyenaraikan panel MP yang mendengar rayuan-rayuan tersebut dan, walau apa pun, kedua-dua hakim itu tidak berhak bersidang mendengar kes-kes tersebut.

Ketujuh-tujuh usul adalah: (i) usul-usul 08(RS)-12-10/2018(B) and 08(RS)-13-11/2018(W) ('usul Yakin Tenggara') berkaitan dengan keputusan MP bertarikh 10 Oktober 2018. Walau bagaimanapun, sebelum kes tersebut diputuskan, Zulkefli HMR telah meletakkan jawatan. Keputusan terbahagi 3-1 dengan Ramly Ali HMP menyampaikan keputusan majoriti dan Balia Yusof HMP untuk minoriti. Apabila menyampaikan penghakiman minoriti, Balia Yusof HMP menyatakan 'Penghakiman di bawah disediakan oleh Tan Sri Zulkefli bin Ahmad Makinudin, Presiden Mahkamah Rayuan pada ketika itu, sebelum persaraannya. Saya bersetuju dan mengguna pakai penghakiman itu'. Aduan pemohon-pemohon adalah bahawa Balia Yusof HMP tidak boleh mengguna pakai 'penghakiman' oleh Zulkefli HMP yang, pada masa itu telah pun meletakkan jawatan. Oleh itu, menyandar pada kes *Bellajade Sdn Bhd v. CME Group Bhd And Another Appeal* ('Bellajade'), perayu-perayu menghujahkan bahawa keputusan MP bertarikh 10 Oktober 2018 tidak teratur dan wajar diketepikan; (ii) usul-usul 08(RS)-3-08/2018(W), 08(RS)-6- 08/2018(W) and 08(RS)-7-08/2018(W) ('usul Yong Tshu Khin') iaitu panel yang menyampaikan keputusan MP terdiri daripada Raus Sharif KHN, Hasan Lah HMP, Azahar Mohamed HMP, Balia Yusof Hj Wahi HMP and Alizatul Khair Osman Khairuddin HMP. Keputusan itu dibacakan oleh Azahar Mohamed HMP bersidang sendirian tetapi penghakiman tersebut ditandatangani oleh Raus Sharif KHN. Oleh itu, dihujahkan bahawa panel tersebut bukan mahkamah yang dibentuk dengan wajar dengan menghujahkan Azahar Mohamed HMP tidak berhak menyampaikan penghakiman dengan bersidang seorang diri kerana itu mencabul s. 78 Akta Mahkamah Kehakiman 1964 ('AMK') yang memperuntukkan bahawa apabila seorang hakim 'tidak hadir' prosiding tersebut boleh diteruskan asalkan jumlah hakim dalam koram tidak kurang daripada dua orang.

Pemohon-pemohon juga menghujahkan bahawa (a) MP tiada bidang kuasa bawah s. 96(a) AMK untuk membuat keputusan; (b) wujud pelanggaran keadilan asasi kerana pemohon-pemohon tidak didengar atas perkara tertentu yang bukan isu di mahkamah di bawah; dan (c) keputusan tersebut khilaf; (iii) usul 08(RS)-14-11/2018(A) ('usul Tan Boon Lee'), iaitu MP mengakas dapatan-dapatan serentak Mahkamah Tinggi dan Mahkamah Rayuan bahawa pemohon bukan litigan yang menyusahkan. Pemohon mengadu bahawa pelanggaran keadilan asasi berlaku kerana MP tidak memberikan alasan penghakiman bertulis; dan (iv) usul 08(RS)-17-12/2018(W) ('usul Tan Wei Hong'), iaitu aduan spesifik adalah bahawa terdapat kegagalan koram atas alasan bahawa MP, dalam keputusan sebulat suara, tidak mempertimbangkan kesemua soalan kebenaran yang dikemukakan dalam kes tersebut. Dalam jawapan mereka, defendan-defendan menghujahkan bahawa kesahihan pelantikan kedua-dua hakim tersebut tidak boleh dicabar secara kolateral dan, walaupun pelantikan mereka dianggap tidak sah, keputusan-keputusan mereka (secara kehakiman dan pentadbiran) diselamatkan oleh 'doktrin *de facto*'. Pemohon-pemohon, dalam jawapan mereka, mengesahkan kewujudan doktrin itu, tetapi menghujahkan bahawa itu tidak terpakai untuk pelantikan berperlembagaan.

Diputuskan (menolak kesemua usul semakan dengan kos)

Oleh Tengku Maimun Tuan Mat KHN menyampaikan penghakiman mahkamah:

(1) Doktrin *de facto* wujud untuk memelihara integriti keputusan-keputusan kehakiman sekurang-kurangnya, berdasarkan dua sebab (i) melindungi keputusan hakim *de facto* daripada serangan kolateral. Jika tidak, litigan persendirian yang gagal akan menguntukkan alasan itu sebagai senjata untuk menentang ketiadaan kuasa hakim atas alasan untuk membicarakan semula kes mereka atau untuk keputusan diubah atas alasan hakim yang mendengar kes mereka bukan hakim sama sekali. Berbuat demikian akan meletakkan prestij dan integriti kehakiman dan sistem kehakiman dalam bahaya dan mendapat nama buruk; dan (ii) walaupun pelantikan hakim diketepikan secara *de jure*, iaitu, pelantikan tersebut adalah secara langsung dan berjaya dipersoalkan dalam prosiding terhadapnya, sama ada dalam *quo warranto* atau prosiding lain, kesemua keputusan yang diberi, sama ada dari segi kehakiman atau pentadbiran, terselamat – bukan hanya untuk menyelamatkan integriti hakim, tetapi juga untuk menyelamatkan integriti penghakiman mahkamah.

(2) Cabaran dalam kes-kes ini adalah jelas tindakan sampingan kerana kesahan pelantikan kedua-dua hakim tidak dibangkitkan sebelum ini semasa perbicaraan rayuan-rayuan sebenar. Juga, hujahan-hujahan tersebut tidak dibangkitkan oleh pemohon-pemohon dalam prosiding berasingan. Dua syarat utama untuk doktrin tersebut diguna pakai adalah: (i) hakim-hakim yang pelantikan mereka dipersoalkan bukan

penceroboh atau perampas semata-mata tetapi memegang jawatan berdasarkan kuasa sah. Pelantikan kedua-dua hakim tersebut dibuat bawah Perlembagaan Persekutuan, tetapi kewajaran pelantikan tersebut dipersoalkan. Oleh itu, kedua-dua hakim tersebut bukan perampas dalam maksud perkataan tersebut kerana pelantikan mereka adalah berasaskan undang-undang; dan (ii) hakim *de facto* tidak boleh dengan sendirinya menyandar atasnya untuk perlindungan diri sendiri. Itu bukan kes di sini dan oleh itu, pemakaian doktrin tersebut tidak dikecualikan.

(3) Doktrin *de facto* sentiasa wujud dalam undang-undang common law Malaysia dan peruntukan-peruntukan perlembagaan dan pentadbiran hanya bersifat perisytiharan dalam skop pemakaiannya. Oleh itu, tiada alasan mengapa doktrin *de facto* tidak terpakai untuk pelantikan berperlembagaan. Berdasarkan perkara itu, pemohon-pemohon berhak mencabar secara kolateral kesahihan pelantikan kedua-dua hakim melalui usul semakan ini. Walau apa pun, walaupun mereka berjaya dalam cabaran tersebut, keputusan kedua-dua hakim itu akan terus kekal berikutan doktrin *de facto*. Dengan itu, isu bersama dalam kesemua usul semakan gagal.

(4) Kes *Bellajade*, yang disandarkan oleh pemohon-pemohon dalam usul-usul Yakin Tenggara berkait dengan ketaksahan penghakiman majoriti, sementara, dalam kes ini, 'mengguna pakai' adalah untuk penghakiman minoriti manakala penghakiman majoriti kekal sah, setelah diberi oleh jumlah ganjil tiga orang hakim. Peruntukan penting yang menentukan kesinambungan prosiding, termasuk penyampaian penghakiman, walaupun tanpa kehadiran seorang hakim adalah s. 78 AMK. Berdasarkan pentafsiran bertujuan s. 78(2) AMK, penghakiman majoriti bebas daripada penghakiman minoriti dan mewakili pendapat 'tiga orang hakim yang tinggal' dan oleh itu, adalah sah. Oleh itu, tiada merit dalam usul-usul Yakin Tenggara dan usul-usul tersebut ditolak dengan kos.

(5) Perkataan 'tidak menghadiri' dalam k. 63(2) KMP tidak mempunyai maksud sama dengan perkataan 'tidak menghadiri' dalam s. 78(1) AMK. Seksyen 78(1) ialah peruntukan anggapan yang menyelamatkan kegagalan panel yang asalnya dibentuk sewajarnya bawah s. 74. Kaedah 63 KMP, sebaliknya, merujuk pada cara penghakiman diumumkan. Ini adalah peruntukan prosedur yang diguna pakai untuk kedua-dua ss. 74 dan 78 AMK. Satu-satu penghakiman akan diumumkan dalam mahkamah terbuka walaupun tanpa kehadiran hakim asalkan koram dibentuk secara substantif (s. 74) atau dianggap dibentuk dengan sah (s. 78). Dengan itu, sama ada koram penuh atau koram yang dianggap dibentuk sewajarnya, k. 63 adalah prosedur bagaimana penghakiman panel tersebut akan diberi. 'Tidak menghadiri' dalam k. 63 oleh itu mesti ditafsir untuk bermaksud ketidakhadiran fizikal semata-mata dan oleh itu, asalkan koram substantif mahkamah dibentuk secara sah dan

mematuhi undang-undang, atau dianggap dibentuk secara sah dan mematuhi undang-undang pada masa penghakiman diberi, penghakiman boleh diumumkan tanpa kehadiran hakim tersebut secara fizikal oleh hakim lain atau pendaftar.

(6) Pada asasnya, dalam persidangan mahkamah rayuan, penghakiman yang diberi oleh hakim, yang telah dibaca dan dipersetujui oleh hakim-hakim sedia ada yang lain, adalah penghakiman mahkamah. Oleh itu, Azahar Mohamed HMP bersidang seorang diri untuk membacakan penghakiman Raus Sharif KHN berjustifikasi bawah k. 63. Empat hakim-hakim lain dalam panel masih ada dari segi undang-undang semasa keputusan disampaikan. Oleh itu, tiada ketidakaturan undang-undang yang menjejaskan koram dan memberi kesan pada s. 78(1) AMK.

(7) Usul untuk semakan tidak dimaksudkan untuk berfungsi sebagai satu lagi peringkat rayuan. Ini dihadkan pada tujuan spesifik untuk menghalang salah laksana keadilan yang jelas. Panel mahkamah yang terkemudian tidak perlu memeriksa keputusan sebelumnya dengan teliti untuk mengesahkan bahawa pihak-pihak diberi setiap peluang untuk didengar atas setiap isu tertentu. Adalah mencukupi untuk menyatakan bahawa pihak-pihak dibenarkan untuk menghujah terhadap setiap isu penting berkaitan kes dan bahawa mahkamah, mengguna pakai kuasa dan sumber kehakiman, mencapai keputusan berdasarkan undang-undang dan fakta kes yang dikemukakan. Mahkamah mendapati tiada alasan untuk menyemak keputusan MP bertarikh 9 Julai 2018. Lima soalan kebenaran yang panjang dirangka dan mahkamah telah mempertimbangkannya dan menanganinya dengan sewajarnya. Usul-usul Yong Tshu Khin tidak melangkaui ambang semakan bawah k. 137 KMP dan oleh itu, ditolak dengan kos.

(8) Mahkamah Persekutuan lazimnya tidak memberi alasan bertulis untuk permohonan-permohonan penolakan atau pemberian kebenaran. Selain daripada fakta bahawa keputusan-keputusan mahkamah di bawah adalah serentak dan MP telah mengakas keputusan itu, pemohon dalam usul Tan Boon Lee tidak memenuhi bahawa terdapat salah laksana keadilan dalam maksud k. 137 KMP. Mahkamah Persekutuan adalah mahkamah tertinggi dan keputusan-keputusannya tidak tertakluk pada rayuan. Selanjutnya, hujahan bahawa disebabkan perintah sedemikian jarang diberi, penting untuk adanya panduan umum terhadap isu tersebut pada masa akan datang, tidak menggambarkan salah laksana keadilan yang serius. Oleh itu, tiada salah laksana keadilan berlaku pada pemohon sehinggakan ambang untuk k. 137 KMP dipenuhi. Usul Tan Boon Lee tidak bermerit.

(9) Apabila MP telah memberi kebenaran, panel terkemudian mahkamah tidak perlu menjawab soalan kebenaran atau soalan-soalan yang dikemukakan jika hal keadaan tidak memerlukannya. Mahkamah boleh, selepas mempertimbangkan merit rayuan, memutuskan bahawa rayuan, yang sensitif dari segi fakta, tidak mewajarkan jawapannya untuk soalan atau soalan-soalan kebenaran. Mahkamah juga boleh memilih untuk tidak menjawab soalan kerana, setelah mempertimbangkan merit rayuan, fakta kes tidak berkait dengan soalan undang-undang yang dirangka secara spesifik itu. Usul Tan Wei Hong didapati tiada merit. Penghakiman tersebut pada asasnya berkait dengan rayuan-rayuan terhadap keputusan-keputusan Mahkamah Tinggi dan Mahkamah Rayuan berkenaan permohonan pembatalan. Rayuan interlokutori sedemikian pada asasnya melibatkan isu budi bicara mahkamah di bawah dan melibatkan isu fakta. Adalah prerogatif mahkamah untuk tidak menjawab atau mempertimbangkan soalan kebenaran. Oleh itu, pemohon-pemohon dalam usul Tan Wei Hong tidak mengalami apa-apa prejudis atau keputusan itu salah akibat kegagalan koram. Oleh itu, usul tersebut ditolak dengan kos.

Case(s) referred to:

Additional District Magistrate, Jabalpur v. S.S Shukla Etc 1976 AIR 1207 ***(refd)***
All Malayan Estates Staff Union v. Rajasegaran & Ors [2006] 4 CLJ 195 FC ***(refd)***
Ann Joo Steel Bhd v. Pengarah Tanah Dan Galian Negeri Pulau Pinang & Anor And Another Appeal [2019] 9 CLJ 153 FC ***(refd)***
Asean Security Paper Mills Sdn Bhd v. Mitsui Sumimoto Insurance (Malaysia) Bhd [2008] 6 CLJ 1 FC ***(refd)***
Bellajade Sdn Bhd v. CME Group Bhd & Another Application [2019] 8 CLJ 1 FC ***(dist)***
Chan Boi Loi v. Public Bank Bhd & Another Application [2009] 6 CLJ 81 FC ***(refd)***
Chen-young And Others v. Eagle Merchant Bank Jamaica Ltd And Others [2018] JMCA App 7 ***(refd)***
Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [2001] 4 CLJ 61 FC ***(dist)***
Clariant Masterbatches (M) Sdn Bhd v. Prestige Dynamics Industries Sdn Bhd [2019] 5 CLJ 835 FC ***(refd)***
Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Appeal [2013] 4 CLJ 901 FC ***(refd)***
English v. Emery Reimbold & Strick Ltd [2002] 3 All ER 385 ***(refd)***
Fawdry & Co v. Murfitt [2004] 4 All ER 60 ***(refd)***
Flannery v. Halifax Estate Agencies Ltd [2000] 1 WLR 377 ***(refd)***
Gokaraju Rangaraju v. State of Andhra Pradesh (1981) 3 SCC 132 ***(refd)***
In Re Aldridge (1893) 15 NZLR 361 ***(refd)***
Jyoti Prokash Mitter v. CJ High Court of Calcutta [1965] 2 SCR 53 ***(refd)***
Lewis v. Wilson & Horton Ltd [2000] 3 NZLR 546 ***(refd)***
Lim Lek Yan v. Yayasan Melaka [2009] 4 CLJ 665 FC ***(refd)***
MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC ***(refd)***
Milward v. Thatcher (1787) 100 ER 45 ***(refd)***
Mohd Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309 FC ***(dist)***
Ng Chin Tai & Anor v. Ananda Kumar Krishnan [2019] 10 CLJ 766 FC ***(refd)***
Norton v. Shelby County (1886) 118 US 425 ***(refd)***

Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd & Another Appeal [2004] 2 CLJ 265 FC ***(refd)***
PS Menon v. State of Kerala AIR 1970 Ker 165 ***(refd)***
Ramachandran Suppiah v. PP [1992] 2 SLR (R) 571 ***(refd)***
Re James (an insolvent) [1977] 1 All ER 364 ***(refd)***
Re Nori's Application [1989] LRC (Const) 10 ***(refd)***
Sabah Forest Industries Sdn Bhd v. UNP Plywood Sdn Bhd [2010] 3 CLJ 779 FC ***(refd)***
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 CLJ 349 FC ***(refd)***
State of Connecticut v. Carroll (1871) 38 Conn 449 ***(refd)***
Surendra Singh & Ors v. State of Uttar Pradesh AIR 1954 SC 194 ***(refd)***
The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik Syed Mohamed & Anor [2008] 1 LNS 100 FC ***(refd)***
United States R Retirement Bd v. Fritz (1980) 449 US 166 ***(refd)***
UOL Credit Sdn Bhd v. Dato' Vijay Kumar Natarajan [2010] 1 CLJ 557 FC ***(dist)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 42, 74, 77, 78(1), (2), (3), 96(a)
Federal Constitution, arts. 122(1A), 125(1), (8), 161(1), Eleventh Schedule s. 33C(b)
Interpretation Acts 1948 and 1967, ss. 17A, 41(a)
Rules of the Federal Court 1995, rr. 63(2), 137

The Constitution of India [Ind], arts. 71(2), 233
The Constitution of Jamaica [Jamaica], s. 106(3)

Other source(s) referred:
Tan Sri Richard Malanjum, *'The 17th Ahmad Ibrahim Memorial Lecture – The Role of Dissenting Judgments'*, 19 October 2018

(Civil Applications No: 08(RS)-3-08-2018(W), 08(RS)-6-08-2018(W) & 08(RS)-7-08-2018(W))
For the applicants - Loh Siew Cheang, Verene Tan Yeen Yi, Goh Ee Voon, Ling Young Tuen, Samantha Su Xiu Ming & Hazel Ling Ai Wenn; M/s Lee Ling & Partners
For the respondents - Cecil Abraham, Rishwant Singh, Pramjit Singh, Harjit Singh, Shopna Rani Malakar & Kiranjeet Kaur; M/s Harjit Sandhu, Wan & Assocs

(Civil Application No: 08(RS)-12-10-2018(B))
For the applicant - Gopal Sri Ram, S Ravenesan, Siti Nur Amirah Adzman, How Li Nee & Marcus Lee; M/s S Ravenesan
For the 1st respondent (Gula Perak Berhad) - Khoo Guan Huat, Nimalan Devaraja & Janice Ooi; M/s Skrine
For the 2nd respondent (AmBank (M) Berhad) - Yoong Sin Min & Poh Choo Hoe; M/s Shook Lin & Bok
For the 3rd respondent - Cecil Abraham, Bharti Seth, Ramesh Sanghvi, Rishwant Singh & Kokilah Kanniappan; M/s Bharti Seth & Assocs
For the 4th respondent - Wong Rhen Yen, Jamie Wong, Wong Li Yan & Shugan Raman; M/s Jamie Wong

(Civil Application No: 08(RS)-13-11-2018(W)
For the applicant - Wong Rhen Yen, Jamie Wong, Wong Li Yan & Shugan Raman; M/s Jamie Wong
For the 1st respondent (Gula Perak Berhad) - Khoo Guan Huat, Nimalan Devaraja & Janice Ooi; M/s Skrine
For the 2nd respondent (AmBank (M) Berhad) - Yoong Sin Min & Poh Choo Hoe; M/s Shook Lin & Bok
For the 3rd respondent - Cecil Abraham, Bharti Seth, Ramesh Sanghvi, Rishwant Singh & Kokilah Kanniappan; M/s Bharti Seth & Assocs
For the 4th respondent - Gopal Sri Ram, S Ravenesan, Siti Nuramirah Azman, How Li Nee & Marcus Lee; M/s S Ravenesan

(Civil Applications No: 08(RS)-14-11-2018(A))
For the applicant - Ramkarpal Singh, Harshaan Zamani & Rayveni Asogan; M/s Karpal Singh & Co
For the respondent - Su Tiang Joo, Nasema Jalaludheen & Rachel See Aimay; M/s Cheah Teh & Su

(Civil Applications No: 08(RS)-17-12-2018(W))
For the applicants - Sitpah Selvaratnam, Ganesan Nethi & Siah Ching Joe; M/s Karpal Singh & Co
For the 1st respondent - Loganath Brian Sabapathy, Sanjeev Kumar Rasiah, Ilyas Ramly & Ariel Priyanka Francis; M/s Sanjeev Kumar & Co
For the 2nd to 4th respondents - Asliza Ali; SFC & Mohd Ashraf Abd Hamid; FC

Reported by S Barathi

JUDGMENT

Tengku Maimun Tuan Mat CJ:

Introduction

[1] On 19 August 2020, we heard seven review motions filed pursuant to r. 137 of the Rules of the Federal Court 1995 ('RFC 1995'). After the close of very lengthy submissions which took up more than this court's usual sitting time, we reserved judgment. We now deliver this unanimous judgment upon much consideration.

[2] The applicants in motions 08(RS)-12-10/2018(B) and 08(RS)-13-11/2018(W) are Yakin Tenggara Sdn Bhd and Datuk Lim Sue Beng, respectively. Their motions are against the decision of the Federal Court delivered on 10 October 2018. We shall refer to this set of motions as the 'Yakin Tenggara motions'.

[3] The applicants in motions 08(RS)-3-08/2018(W), 08(RS)-6-08/2018(W) and 08(RS)-7-08/2018(W) are Yong Tshu Khin and Annie Quah Lay Nah and their three collective review motions are against the decision of the Federal Court delivered on 9 July 2018. This set of motions will be referred to as the 'Yong Tshu Khin motions'.

[4] For motion 08(RS)-14-11/2018(A), the applicant is one Tan Boon Lee. His complaint is against the order of the Federal Court dated 26 September 2017. We shall refer to this motion as 'Tan Boon Lee's motion'.

[5] The final motion 08(RS)-17-12/2018(W) is filed by five applicants, namely, Tan Wei Hong, Tan Wei Jie, Tan Hun Khong, Lai Chew Lai and Chuan Hung Chien, against the order of the Federal Court dated 28 November 2017 and the grounds of judgment for which is dated 22 May 2018. We shall refer to the motion as 'Tan Wei Hong's motion.'

[6] All the seven review motions raised a common point and further specific points peculiar to their circumstances.

[7] The common point alleges coram failure, in sum, that the appointments of Tun Md Raus bin Sharif as Chief Justice and of Tan Sri Zulkefli bin Ahmad Makinudin as President of the Court of Appeal (collectively, the 'two judges') were respectively invalid. Arguments were advanced to the effect that the advice given by the outgoing Chief Justice, Tun Arifin bin Zakaria, to the Yang di-Pertuan Agong to appoint the two judges as additional judges of the Federal Court was invalid because such advice may only be given by a sitting Chief Justice to take effect during his tenure, and that in any event, the two judges could not have occupied their respective positions as Chief Justice and President of the Court of Appeal as additional judges of the Federal Court on a proper interpretation of art. 122(1A) of the Federal Constitution ('FC'). Accordingly, it was argued that Tun Raus was not entitled to empanel the Federal Court panels which heard the appeals and in any event, that the two judges were not entitled to sit in these cases (if they sat).

[8] In this judgment, we shall first deal with the common point followed by our discussion *in seriatim* on the specific points later.

[9] For convenience, in our discussion on the common point our reference to 'applicants' refers globally and collectively to all the applicants in all the motions and likewise, our reference to 'respondents' refers to all parties who opposed the argument.

Decision

The De Facto Doctrine

[10] The applicants' arguments were summarised earlier. In gist, it was their submission that the appointments of the two judges were invalid having been made *ultra vires* the FC. The thrust of the respondents' rebuttal is that the validity of the two judges' appointments cannot be challenged collaterally and that even if their appointments are deemed invalid, their decisions (both judicial or administrative) are saved by the '*de facto* doctrine'. In reply, the applicants acknowledged the existence of the doctrine but argued that it does not apply to constitutional appointments.

[11] The *de facto* doctrine is a trite principle of law. The Supreme Court of Connecticut in *State of Connecticut v. Carroll* (1871) 38 Conn 449 ('*Carroll*') managed to trace the doctrine back to the year 1431 on an incident that transpired in the Abbot of Fountaine's case where it was argued that a bond given by the former abbot for the furnishing of the convent despite the fact that a new abbot had been elected to replace him, was valid.

[12] In *In Re Aldridge* (1893) 15 NZLR 361, the New Zealand's Court of Appeal discussed the validity of the judicial acts of the three Lancastrian Kings preceding King Edward VI, whom he had declared to be usurpers. A statute was passed to declare valid the judicial acts of those kings and it was later agreed that the statute was merely declaratory of the common law *de facto* doctrine.

[13] The abbot and the three Lancastrian Kings were not of course holders of 'judicial office' as we now understand the term. That said, a decision of Buller J decided as far back as 1787 in *Milward v. Thatcher* (1787) 100 ER 45 ('*Milward*') had this to say in respect of the application of the *de facto* doctrine to judges, at p. 48:

> The cases cited … are cases of writs of error brought in civil actions, and the objection was taken to the competency of the Judges below: but in such cases the question whether they be properly Judges or not, can never be determined; it is sufficient if they be Judges *de facto*. Suppose a person were even criminally convicted in a Court of Record, and the recorder of such Court were not duly elected, the conviction would still be good in law, he being the Judge *de facto*.

[14] This court judicially recognised and applied the *de facto* doctrine in *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195; [2006] 6 MLJ 97 ('*Malayan Estates*').

[15] What is the *de facto* doctrine and why does it exist? The respondents rested their arguments on *Malayan Estates* which held that the decisions of a judge or judicial arbiter can be deemed valid on grounds of public policy even if his appointment is invalid. The Federal Court arrived at this conclusion by placing heavy reliance on the judgment of the Indian Supreme Court in *Gokaraju Rangaraju v. State of Andhra Pradesh* (1981) 3 SCC 132 ('*Gokaraju*') the facts of which can be summarised as follows.

[16] The case was a consolidated appeal by two accused persons who were convicted of certain offences each by two separate district court judges. By the time the appeal came up before the Supreme Court, the court had held in another appeal that the appointments of the two Sessions Judges were invalid as having violated art. 233 of the Indian Constitution. The appellants argued that as the appointments of the two judges were unconstitutional, their judgments were not lawful and that accordingly, their convictions ought to be set aside.

[17] The Indian Supreme Court rejected the arguments on the basis that the decisions of the two Sessions Judges were saved by the *de facto* doctrine. The rationale is that so long as the *de facto* judge acted under some colour of lawful authority, his decision may be saved and preserved even if his appointment is later found to be invalid. It is to be noted that the argument in *Gokaraju* was principally the same as the argument here, that is to say, that a judgment of a judge who is not a judge is not a judgment at all. In answer to this point, Reddy J remarked, at pp. 134-135:

> The question may seem to be short and simple but it cannot be answered without enquiry and research. An answer, on first impression, may be 'a judgment by a judge who is not a judge is no judgment' a simple, sophisticated answer. But it appears second thoughts are necessary. What is to happen to titles settled, declarations made, rules issued, injunctions and decrees granted and even executed? What is to happen to sentences imposed? Are convicted offenders to be set at liberty and to be tried again'? Are acquitted accused to be arrested and tried again? Public policy is clearly involved. And in the tangled web of human affairs, law must recognise some consequences as relevant, not on grounds of pure logic but for reasons of practical necessity. To clear the confusion and settle the chaos, judges have invented the *de facto* doctrine, … .

[18] The Indian Supreme Court also endorsed the following observations of the Kerala High Court in *PS Menon v. State of Kerala* AIR 1970 Ker 165, at p. 170:

> 19. This doctrine was engrafted as a matter of policy and necessity to protect the interest of the Public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law. But although these officers are not officers *de jure* they are by virtue of the particular circumstances, officers, in fact, whose acts, public policy requires should be considered valid.

[19] The decision in *Gokaraju* cited and approved a long line of authorities which also made similar observations as regards the validity and integrity of decisions of administrative or judicial bodies whose appointments were subsequently deemed to be invalid. These authorities include *Milward* (*supra*), *In Re Aldridge* (*supra*), *Carroll* (*supra*), *Fawdry & Co v. Murfitt* [2004] 4 All ER 60, *Norton v. Shelby County* (1886) 118 US 425 and *Re James (an insolvent)* [1977] 1 All ER 364 ('*Re James*'). These authorities were also cited with approval by this court in *Malayan Estates* (*supra*). Without regurgitating them *ad nauseam*, it would suffice to conclude them thus.

[20] The *de facto* doctrine exists to preserve the integrity of judicial decisions for at least one of two reasons. Firstly, it insulates the *de facto* judge's decision from collateral attack. Otherwise, unsuccessful private litigants will reserve the point as an ammunition to attack the judge's lack of authority as a ground to re-litigate their case or to have the outcome

changed for the reason that the judge who heard their case was no judge at all. Doing so would be to put the prestige and integrity of justice and the justice system into jeopardy and disrepute. Secondly, even if a judge's appointment is set aside *de jure*, meaning that his appointment is directly and successfully assailed in proceedings against him be it in *quo warranto* or other proceedings, all decisions made by him either judicially or administratively are saved – not so much to save the integrity of that judge *per se*, but to save the integrity of the judgment of the court.

[21] To this effect, this court recently made a similar observation in the case of *Ann Joo Steel Bhd v. Pengarah Tanah Dan Galian Negeri Pulau Pinang & Anor And Another Appeal* [2019] 9 CLJ 153; [2020] 1 MLJ 689 in respect of court orders given without jurisdiction and how they cannot be challenged collaterally. Rohana Yusuf FCJ (as she then was) observed:

> [65] The fundamental principle which is pivotal in all these decisions, is that the sanctity of a court order must at all times be observed, and a party bound by that order of a court has no business deciding for himself that a binding order of a court need not be observed because in his view it is not valid.
>
> If court orders are allowed to be ignored with impunity, it will ruin the authority of judicial order, which is the core of all judicial systems. In line with our jurisprudence, court orders must be respected and complied with. There will be no end to litigation if parties are allowed to determine for themselves that any order of the court would be observed or otherwise.

[22] A similar conclusion was endorsed by the Indian Supreme Court in *Gokaraju* (*supra*) in respect of judicial appointments and why decisions of *de facto* judges must be upheld as a matter of policy. At pp. 136-137, 140-141, Reddy J held as follows:

> 4. … As one of us had occasion to point out earlier "the doctrine is founded on good sense, sound policy and practical expedience. It is aimed at the prevention of public and private mischief and the protection of public and private interest. It avoids endless confusion and needless chaos. An illegal appointment may be set aside and a proper appointment may be made, but the acts of those who hold office *de facto* are not so easily undone and may have lasting repercussions and confusing sequels if attempted to be undone. Hence the *de facto* doctrine.
>
> …
>
> 17. A judge, *de facto*, therefore, is one who is not a mere intruder or usurper but one who holds office, under colour of lawful authority, though his appointment is defective and may later be found to be defective. Whatever be the defect of his title to the office, judgments pronounced by him and acts done by him when he was clothed with the powers and functions of the office, *albeit* unlawfully, have the same efficacy as judgments pronounced and acts done by a judge *de jure*. Such

> is the *de facto* doctrine, born of necessity and public policy to prevent needless confusion and endless mischief. There is yet another rule based on public policy. The defective appointment of a *de facto* judge may be questioned directly in a proceeding to which he be a party but it cannot be permitted to be questioned in a litigation between two private litigants … A judge's title to his office cannot be brought into jeopardy in that fashion. Hence the rule against collateral attack on validity of judicial appointments. ...

[23] Now, in these cases before us, the challenge is clearly a collateral one because the validity of the appointments of the two judges was not raised before them during the hearing of the appeals proper. Neither was the argument raised by the applicants herein in separate proceedings. The respondents argued that this failure gives rise to estoppel and waiver. These arguments, to our mind, are not relevant because the *de facto* doctrine makes it quite plain that the validity of a judge's appointment cannot be raised in collateral proceedings. In other words, the plea of waiver or estoppel is not necessary, as in the first place, the validity of a judge's appointment cannot be attacked collaterally.

[24] In any event, even if we were to accept the argument that the two judges' appointments were unlawful, their decisions remain protected by the *de facto* doctrine. The two main conditions for the doctrine to apply, as gleaned from the foregoing authorities, are that firstly, the judges whose appointments were assailed are not mere intruders or usurpers but were holding office under some colour of lawful authority. There is no doubt that the appointments of the two judges were made under the FC, except that the propriety of such appointments is in issue. The two judges are therefore not usurpers in the sense of the word as there is some legal basis for their appointments. The other condition for the doctrine to apply is that the *de facto* judge cannot himself rely on it for his own protection. See: *Re Aldridge* (*supra*), at p. 372. That is not the case here and as such the application of the doctrine is not excluded.

[25] The natural conclusion to this issue may thus be best summarised in the words of Lord Denning MR in *Re James* (*supra*), at pp. 372-373:

> No matter by whom the man was appointed a judge, no matter at what date he was appointed, he is sitting as a judge of the court and the order made by him is an order of the High Court of Rhodesia. He sits in the seat of a judge. He wears the robes of a judge. He holds the office of a judge. Maybe he was not validly appointed. But, still, he holds the office. It is the office that matters, not the incumbent... So long as the man holds the office and exercises it duly and in accordance with law, his orders are not a nullity. If they are erroneous, they may be upset on appeal. But, if not erroneous, they should be upheld.

[26] With that, the only question that remains to be addressed is whether the *de facto* doctrine applies to constitutional appointments. The applicants speaking primarily through learned counsel Datuk Seri Gopal Sri Ram, submitted that the doctrine cannot apply to constitutional appointments. They sought to distinguish the authorities cited by the respondents, especially *Malayan Estates* and *Gokaraju* for the point that the appointments concerned in those cases were in respect of inferior tribunals and not superior courts.

[27] With respect, we do not agree. It is our view that the *de facto* doctrine (the rule and its exceptions) applies equally to constitutional appointments.

[28] We appreciate that *Gokaraju* concerned the appointments of district court judges. However, it must be noted that their appointments were constitutional ones pursuant to art. 233 of the Indian Constitution. And thus, *Gokaraju* on the facts establishes the *ratio decidendi* that the *de facto* doctrine is also applicable to superior court judges as their appointments are also constitutional (though with different formalities).

[29] In fact, the Indian Supreme Court was invited to address the question on whether the doctrine applies to constitutional appointments. Reddy J's answer is found at p. 141, as follows:

> 18. We do not agree with the submission of the learned counsel that the *de facto* doctrine is subject to the limitation that the defect in the title of the judge to the office should not be one traceable to the violation of a constitutional provision. The contravention of a constitutional provision may invalidate an appointment but we are not concerned with that. We are concerned with the effect of the invalidation upon the acts done by the judge whose appointment has been invalidated. The *de facto* doctrine saves such acts. The *de facto* doctrine is not a stranger to the Constitution or to the Parliament and the Legislatures of the States.

[30] The Indian Supreme Court referred to art. 71(2) of the Indian Constitution which stipulates that the acts of the President or Vice-President of India shall not be invalidated in the event that their appointments are declared void. Reddy J observed that other provisions in other Indian written laws are also replete with such provisions. The court continued to observe that the existence of such provisions does not suggest that the application of the doctrine is limited or circumscribed by them. On the contrary, the said provisions whether constitutional or statutory, merely declare their existence.

[31] In Malaysia, this court in *Malayan Estates* applied s. 41(a) of the Interpretation Acts 1948 and 1967 ('Act 388') in a manner similar to the court in *Gokaraju* to extend the *de facto* doctrine to the Chairman of the Industrial Court whose appointment was declared invalid in that case but nonetheless whose decisions were not set aside for that reason. There is a provision in the FC which s. 41(a) of Act 388 appears to mirror, that is, s. 33C(b) of the Eleventh Schedule of the FC read together with art. 161(1).

The said s. 33C(b) provides:

> 33C Powers of board, etc., not affected by vacancy, etc:
>
> Where by or under any written law any board, commission, committee or similar body, whether corporate or unincorporate, is established, then, unless the contrary intention appears, the powers and proceedings of such board, commission, committee or similar body shall not be affected by:
>
> …
>
> (b) any defects afterwards discovered in the appointment or qualification of a person purporting to be a member thereof;

[32] We acknowledge that s. 33C(b) is not directly applicable within the narrower context of the present review motions. However, we are of the view that it nonetheless resonates with the views expressed by the court in *Gokaraju* and that in a Malaysian context, the *de facto* doctrine has always existed in Malaysian common law and that constitutional and statutory provisions are merely declaratory of the scope of its application. In that sense, we do not see why the *de facto* doctrine is inapplicable to constitutional appointments.

[33] In any event, learned counsel Datuk Seri Gopal Sri Ram, with whom other counsel for the applicants agreed, appeared to suggest that the scope of the doctrine should be confined to subordinate officers and judicial arbiters and accordingly, the doctrine cannot apply to superior court judges. With respect, we do not agree. The danger the *de facto* doctrine seeks to avoid is the chaos and confusion that may be occasioned in the event the appointment of a decision-maker is found to be invalid and the stain that it might leave on the administration of justice.

[34] Whatever it is, the judgments of Magistrates and Sessions Court Judges are subject to appeal or review (as the case may be). The decisions of superior court judges are weightier especially those of the Court of Appeal and Federal Court (the latter being the final court of appeal). In addition, administrative decisions of the Chief Justice or President of the Court of Appeal such as recommendations on the appointments and elevation of judges or their discretions to empanel the Federal Court or the Court of Appeal, respectively carry significant ramifications. If the decisions of a superior court judge are not preserved by the *de facto* doctrine, the entire justice system might crumble to dust if such appointments are later deemed invalid.

[35] Datuk Seri Gopal Sri Ram sought to distinguish *Gokaraju* (*supra*) by referring to another judgment of the Indian Supreme Court in *Jyoti Prokash Mitter v. CJ High Court of Calcutta* [1965] 2 SCR 53 ('*Jyoti*') for the point that the *de facto* doctrine does not apply to constitutional appointments. In particular, learned counsel relied on the following *dictum* of Gajendragadkar CJ at p. 66:

> In such a case, if the decision of the President goes against the date of birth given by the appellant, a serious situation may arise, because the cases which the said Judge might have determined in the meanwhile would have to be reheard, for the disability imposed by the Constitution when it provides that a Judge cannot act as a Judge after he attains the age of superannuation, will inevitably introduce a constitutional invalidity in the decisions of the said Judge, and it is plain that it would be the duty of the Chief Justice to avoid such complication.

[36] *Jyoti* concerned the question of who under the Indian Constitution had the final say in the determination of a judge's age. The appellant contended that at the date of his appointment, he had provided the Government with documents attesting to his age and that once accepted, his age could no longer be disputed. The dispute came about when the Indian Home Minister upon examining public records and upon consulting the Chief Justice of India ascertained that the appellant's birth date was 27 December 1901. The Chief Justice of the Calcutta High Court accordingly determined that the appellant would reach the age of superannuation (retirement) on 26 December 1961 and asked him to demit his office on that date and allotted him no further work beyond it. The Supreme Court ultimately concluded that the determination as to the appellant's age should be made solely by the President of India and not the Government.

[37] The respondents argued that *Jyoti* is not authority for the proposition which the appellants made, that is to say, that the *de facto* doctrine does not apply to constitutional appointments. It was submitted that the above passage on which the appellants relied on, is at best *obiter dicta* because the case itself did not concern the question as to the validity of the decisions made by the appellant post-superannuation. With respect, we agree with the respondents. *Gokaraju*, when understood and read in light of its facts, posits the *ratio decidendi* that the *de facto* doctrine applies to constitutional appointments and the kind of appointment (whether of a superior court judge or subordinate court judge) does not matter. *Jyoti* does not in any way alter or affect that conclusion. The *dictum* of Gajendragadkar CJ when read in context does not therefore lend much assistance to the applicants.

[38] Learned counsel, Datuk Seri Gopal Sri Ram also made reference to the judgment of Ward CJ in *Re Nori's Application* [1989] LRC (Const) 10 ('*Nori*') for the proposition that common law cannot take precedence over the FC. Learned counsel read out on the following passage of Ward CJ's judgment, at p. 22:

> A similar conclusion was reached by the New Zealand Court of Appeal in *Re Aldridge* (1893) 15 NZLR 361 after an exhaustive examination of the authorities (especially in the judgments of Prendergast CJ and Richmond J). Recent cases in England (*Adams v. Adams* [1971] P 188 and *Re James (an insolvent) (A-G intervening)* [1977] 1 All ER 364) affirm these earlier decisions.

> Mr Nori does not accept those authorities as having any force here. The law we are considering, he points out, is a Solomon Islands law. Nothing in it suggests the doctrine of *de facto* office has any place here. By s. 76 and Sch 3 to the Constitution, the principles and rules of the common law and equity shall have effect as part of the law of Solomon Islands save in so far as they are inconsistent with the Constitution or any Act of Parliament. Therefore, he argues, as the Constitution requires the participation of the Governor General for the election of a Prime Minister and the appointment of the Ministers of the Government, it clearly requires a Governor General *de jure*. When Sir George performed those acts earlier this year, he was not an officer *de jure* and so the acts must be void. Any provision of the common law that allows an interpretation inconsistent with that shall not have effect as part of the law of Solomon Islands.

[39] With respect, the above passage must be read in context. Ward CJ merely repeated and summarised the argument of the applicant in that case. On the facts, Ward CJ nonetheless concluded that the *de facto* doctrine could apply to the Governor General of Solomon Islands to preserve all subsequent acts of his such as the dissolution of Parliament and the subsequent appointments of the Prime Minister and Cabinet as factually valid. While the appointment of the Governor General, Sir George Lepping, was held to be invalid, his acts during the period of invalidity were deemed valid. To complete the narrative on this point, Ward CJ, in response to the arguments which he rejected, observed as follows, at pp. 22-23:

> I think he takes the provision too far. The application of the common law doctrine of *de facto* office to the situation we now face does not suggest the Governor General can act outside the Constitution or ignore the requirements of the law. Everything he did after his appointment was done according to the requirements of the law and accepted to be so by the public as a whole. Neither does it suggest he be considered a *de facto* officer except when he is the apparent incumbent of a *de jure* office. What the application of this doctrine does is to consider the effect on those acts of a misapprehension of his position ...
>
> I feel, with respect, that is a sound argument. I cannot accept the subsequent discovery that an earlier and, to all appearances, lawful act was carried out by an officer who, through some inadvertence, was not lawfully appointed can invalidate that act. To do so would create an impossible situation. One only needs to ask how far back this would apply to realise the impossibility of such a view.

[40] Accordingly, we are unpersuaded that *Nori* is authority for the proposition that the *de facto* doctrine cannot apply to constitutional appointments. The *ratio* of the case establishes quite the opposite. The Governor General is the representative of the Sovereign, Her Majesty the Queen of England, and his appointment is thus a constitutional one. The case

further fortifies our view that the *de facto* doctrine applies to preserve the appointment of superior court judges inasmuch as it applied to the constitutionally appointed district court judges in *Gokaraju* or the Governor General in *Nori*.

[41] Finally, learned counsel for the respondent in Tan Boon Lee's motion, Mr Su Tiang Joo, referred us to art. 125(8) of the FC for the argument that the provision constitutionally encapsulates the *de facto* doctrine. It reads as follows:

> Notwithstanding Clause (1), the validity of anything done by a judge of the Federal Court shall not be questioned on the ground that he had attained the age at which he was required to retire.

[42] Clause (1) of art. 125 of the FC in turn provides:

> Subject to the provisions of Clauses (2) to (5), a judge of the Federal Court shall hold office until he attains the age of sixty-six years or such later time, not being later than six months after he attains that age, as the Yang di-Pertuan Agong may approve.

[43] Learned counsel however, did not make any reference to any decided cases to support his submission. Regardless, the judgment of the Court of Appeal of Jamaica in *Chen-young And Others v. Eagle Merchant Bank Jamaica Ltd And Others* [2018] JMCA App 7 ('*Chen-Young*') suggests in its interpretation of s. 106(3) of the Jamaican Constitution (in *pari materia* with our art. 125(8) of the FC), that the provision only applies to cases concerning judges who deliver judgments notwithstanding their retirement.

[44] Without commenting on the correctness of that opinion, it is our view that it is not necessary for us to dwell on art. 125(8) of the FC within the context of these review motions as what we are required to deal with is not a situation where retired judges delivered judgment pass their retirement date. Instead, it concerns the two judges, their appointments as additional judges of the Federal Court and them holding office as Chief Justice and President of the Court of Appeal, respectively. To that extent, we have already observed that upon the application of the foregoing authorities, irrespective of art. 125(8) of the FC, the *de facto* doctrine applies.

[45] Accordingly, it is our considered view that the applicants are not entitled to collaterally challenge the validity of the appointments of the two judges through these review motions. In any case, even if they were successful in that challenge, the decisions of the two judges will continue to stand by virtue of the *de facto* doctrine. It therefore follows that the common point in all the review motions fails.

[46] We will now proceed to address the specific points raised in each set of motions.

The Yakin Tenggara Motions

[47] The Yakin Tenggara motions concern the decision of the Federal Court dated 10 October 2018. The five-member panel which originally heard the case consisted of Zulkefli Ahmad Makinudin PCA, Ramly Ali FCJ, Azahar Mohamed FCJ, Balia Yusof Hj Wahi FCJ and Alizatul Khair Osman Khairuddin FCJ. However, by the time the case came up for decision, Zulkefli PCA had resigned. The decision of the Federal Court was split 3-1 with Ramly Ali FCJ delivering the decision of the majority and Balia FCJ for the minority. In delivering the minority judgment, Balia FCJ said this:

> The judgment as set out below was prepared by Tan Sri Zulkefli bin Ahmad Makinudin, the then President of the Court of Appeal, prior to his retirement. I concur with and adopt the judgment.

[48] The applicants' complaint is that Balia Yusof FCJ was not entitled to adopt the 'judgment' of Zulkefli PCA who at the time had already resigned (though the word Balia FCJ used was 'retirement'). Accordingly, the applicants placed significant reliance on the judgment of this court in *Bellajade Sdn Bhd v. CME Group Bhd & Another Application* [2019] 8 CLJ 1; [2019] 5 MLJ 141 ('*Bellajade*') to argue that the decision of the Federal Court dated 10 October 2018 is bad and is liable to be set aside.

[49] At first blush, it would appear that *Bellajade* lends significant assistance to the applicants. However, upon careful perusal of the submissions, the authorities and upon further deliberation, we considered otherwise. The issue in *Bellajade* was very similar to the one giving rise to the present motions. There, the majority of the Federal Court purported to adopt the judgment of Zulkefli PCA, who had already resigned. A differently constituted panel of this court allowed the motion for review, set aside the judgment of the previous panel and ordered that the appeals be reheard.

[50] The respondents' submission, as we understand it, is that *Bellajade* is entirely distinguishable. That case concerned the invalidity of the majority judgment. Here, the respondents argued, the 'adoption' was of a minority judgment and that the majority judgment still stands as valid having been delivered by an uneven number of three judges. We find merit in this contention.

[51] The primary provision which governs the continuation of proceedings (including the delivery of judgment) notwithstanding the absence of a judge is s. 78 of the Courts of Judicature Act 1964 ('CJA 1964'). The only provision which concerns us is sub-s. (2) which provides:

> (2) In any such case as is mentioned in subsection (1) the proceedings shall be determined in accordance with the opinion of the majority of the remaining Judges of the Court, and, if there is no majority the proceedings shall be re-heard.

[52] The question is how should we interpret the phrase 'the opinion of the majority of the remaining judges of the court'? It could have one of two meanings. A

[53] The first possible meaning is that notwithstanding the absence of a judge, the judges who remain still comprise a valid coram. Though there may be a split decision, and there is an uneven number (not being less than two) to make up the coram, the dissenting judge is still counted in the coram. Suppose, in a coram of five, only four judges remain to deliver judgment. Neither the majority nor the minority is allowed to rely on the opinion of a judge who does not compose the court. Thus, the judgment delivered, though by majority, must only be from the 'remaining judges'. The emphasis is on the words 'remaining judges'. If we go by this argument, the applicants are right in their argument that there was coram failure. B C

[54] The second possible construction, wider than the first, is this. So long as there is a decision from an uneven number of judges (not being less than two) from among judges who composed the court and who have not retired, there is a valid majority decision. Accordingly, it matters not whether there was a dissenting judge or for that matter, whether his dissenting judgment was invalid or not. D

[55] The fundamental difference between the two possibilities is that in the case of the first, while the majority decision may stand in terms of numbers, the whole decision is deemed invalid because the dissenting judge being counted towards the coram, relied on the 'judgment' of a person who was not a 'remaining judge' and thus from someone not 'composing the court'. In the second possible interpretation, the opinion of the dissenting judge is severable and the majority decision (having made up the numbers) still comprises the decision of 'remaining judges' and is thus valid. E F

[56] We prefer the second possible construction for the reason that it accords with the purposive rule of construction. Section 17A of Act 388 requires that in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act shall be preferred to a construction that would not promote that purpose or object. In this case, a provision which supports the intention of Parliament is to be preferred over the one which militates against it. It is a settled principle of law that the purposive rule applies where there is ambiguity in a statute such as when a literal reading of it opens it to two or more meanings. The interpretation which favours the provision's intendment is to be preferred (see *Malayan Estates*, at para. 12). What then is this purpose we are referring to? G H

[57] It is trite law that dissenting judgments have no force of law. See for example a comment by the United States' Supreme Court in *United States R Retirement Bd v. Fritz* (1980) 449 US 166, at footnote 10, per Rehnquist J: I

> The comments in the dissenting opinion… are just that: comments in a dissenting opinion ...

[58] Here, the rule has statutory recognition by virtue of ss. 74 and 77 of the CJA 1964. Section 74 requires that all proceedings of the Federal Court shall be disposed of by three judges or such greater uneven number of judges while s. 77 stipulates that the said proceedings shall be determined in accordance with the majority opinion of the judges composing the court. It therefore stands to reason that legally speaking, minority judgments do not have any force of law as between the parties in that suit. Nevertheless, they play an important role in subsequent cases in the development of the law (see generally, Tan Sri Richard Malanjum, '*The 17th Ahmad Ibrahim Memorial Lecture – The Role of Dissenting Judgments*' (19 October 2018); and *Additional District Magistrate, Jabalpur vs. S. S. Shukla Etc.* (1976) AIR 1207, per Khanna J at p. 1277).

[59] Of course, we acknowledge that ss. 74 and 77 of the CJA 1964 are only applicable to 'properly constituted courts' – in the sense of the phrase. Section 78 of the CJA 1964 encompasses situations where the original coram suffers infirmities which the section sets out. Section 78 was amended in 1998 *vide* Act A1031. The pre-amendment s. 78(1) only allowed the continuation of proceedings upon consent of parties and if such consent was absent, then according to the now deleted s. 78(3), the proceedings had to be reheard (see: *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577; [2002] 2 MLJ 673). The post-amendment s. 78(1) and s. 78(3) of the CJA 1964 do away with the consent requirement while retaining s. 78(2) in its original form.

[60] The logical conclusion from this is that Parliament had intended that the validity of the proceedings cannot be left to the choice of mutual consent by parties. In this sense, the legislative intent for amending s. 78 of the CJA 1964 but retaining s. 78(2) was to merely restate the rule in s. 77, that is to say, so long as there is a decision from the 'majority of the judges composing the court', there is a valid and enforceable decision. The critical difference between ss. 77 and 78 of the CJA 1964 is that the former employs the narrower phrase 'majority of the judges composing the court' while the latter section drops the words 'composing the court'. Thus, even if the minority opinion adopts the judgment of a person who no longer composes the court, the majority judgment remains valid if it is delivered by the majority of the remaining judges not being less than two.

[61] The above is in stark contrast to *Bellajade* where the 'majority judgment' was not the opinion of the remaining judges. It was that of a person who was a non-remaining judge. The 'majority judgment', in that case, did not therefore legally exist in accordance with s. 78(2) of the CJA. This is apparent in the opinion of David Wong CJSS:

> [27] … As Tan Sri Zulkefli at the date of pronouncement of the judgment on 25 September 2018 did not hold any judicial post, his judgment cannot be featured in any way at all as by doing so it can be said that he continued to be a member of the coram on that day hence it was not

> legally competent for the remaining Judges to deliver and pronounce his judgment. As stated earlier, the views of the three remaining judges must be theirs. Relying on the impugned judgment by concurring with and adopting it gave rise to the inference that the 'mind of the court' was that of a judge who had lost his jurisdiction due to his resignation.

[62] Here, for reasons stated, *Bellajade* applies only to the extent of invalidating the minority judgment. But, upon a purposive construction of s. 78(2) of the CJA 1964, the majority judgment stands independently of the minority judgment and it having been delivered by the majority of the remaining judges of the court, is valid. For all intents and purposes, the judgment impugned in this case did represent the views of 'the three remaining judges' and hence it is valid.

[63] As such, we find no merit in the Yakin Tenggara motions and they are accordingly dismissed with costs.

The Yong Tshu Khin Motions

[64] The Federal Court decision giving rise to the Yong Tshu Khin motions was delivered on 9 July 2018. The panel consisted of Raus Sharif CJ, Hasan Lah FCJ, Azahar Mohamed FCJ, Balia Yusof Hj Wahi FCJ and Alizatul Khair Osman Khairuddin FCJ. The decision was read out by Azahar Mohamed sitting alone but the judgment was signed by Raus Sharif CJ.

[65] Two counsel argued the review motions namely, Dato' Loh Siew Cheang ('Dato' Loh') and Mr Ling Young Tuen ('Mr Ling'). The points they canvassed were different and we shall address them in turn beginning with the jurisdictional issue raised by Mr Ling.

[66] Mr Ling argued that the Federal Court panel which delivered the judgment was not of a duly constituted court. His argument is that Azahar Mohamed FCJ was not entitled to deliver the judgment sitting alone as that violates s. 78(1) of the CJA 1964 which, according to counsel, requires that where a judge is 'absent' the proceedings can continue provided that the number of judges in the coram is not less than two. Counsel submitted that here we have a situation with a judge sitting in a coram with less than two. In support of his submission, Mr Ling made reference to the judgment of this court in *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61; [2001] 4 MLJ 1 ('*Chia Yan Tek*').

[67] During argument, we had posed a question to learned counsel on the application of r. 63 of the RFC 1995. We queried him as to whether, if we go by his submission, he concedes that the prevailing practice of the Federal Court (and indeed of the Court of Appeal) of having Registrars read out court judgments in the absence of a judge is an erroneous one. He conceded so.

[68] With respect, *Chia Yan Tek*, as will be seen, is the answer to the very issue he raised. Hence, upon a proper reading of the case, there is no merit in learned counsel's contention.

[69] Rule 63 of the RFC 1995 provides as follows:

> 63. Pronouncement of judgement
>
> (1) The judgment of the Court shall be pronounced in open Court, either on the hearing of the appeal or any subsequent time, of which notice shall be given by the Registrar to the parties to the appeal.
>
> (2) Such judgment may be pronounced notwithstanding the absence of the Judges who composed the Court or any of them, and the judgment of any Judge not present may be read by a Judge of the Court or by the Registrar.

[70] It is our considered view, upon considering all the relevant authorities, namely *Bellajade*, *Chia Yan Teck, Ramachandran Suppiah v. PP* [1992] 2 SLR (R) 571 ('*Ramachandran*') and *Surendra Singh & Ors v. State of Uttar Pradesh* AIR 1954 SC 194 ('*Surendra*'), that the word 'absence' in r. 63(2) does not share the same meaning as the word 'absence' in s. 78(1) of the CJA 1964. The cases illustrate that there is a fundamental difference between the procedural and substantive validity of a judgment *vis-à-vis* the coram.

[71] As alluded to earlier in our discussion on the Yakin Tenggara motions, s. 78(1) is the statutory exception to s. 74. That is to say, s. 78 is a deeming provision which saves the disruption of the panel which was originally properly constituted under s. 74. The disruption may have been caused by any of the grounds stated in s. 78(1). These grounds such as a judge being 'unable, through illness or any other cause' (appearing in the earlier part of the section) or 'the absence or inability to act' (appearing in the later part of the same section), all refer to legal incapacity. Examples include retirement, illness or resignation. These are legal grounds which either permanently or temporarily remove the given judge from existence in the panel. The post-amendment s. 78(1) ensures that proceedings can continue without having to dissolve the coram subject to the condition that the panel is not reduced to less than two judges.

[72] Section 78(1) of the CJA 1964 is broad. *Mohd Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309; [2002] 4 MLJ 449 at 481, is the case to show how the Federal Court sat on 13 occasions and that the proceedings continued with judgment reserved and delivered in spite of the untimely demise of Wan Adnan PCA. In *Chia Yan Tek*, two of the three judges composing the court hearing the appeal had retired. The review panel set aside the court's earlier decision because the retirement of the two judges, bringing the coram down to just one judge, could no longer be saved by s. 78(1). In *Bellajade*, Zulkefli PCA had resigned and the majority purported to read out the judgment of a judge who was legally deemed to no longer exist as a judge. In all these cases, s. 78(1) was attracted because the relevant judges were incapable of acting as a matter of law such that the substantive validity of the entire coram was affected.

[73] Rule 63 in turn refers to the manner in which a judgment is to be pronounced. It is a procedural provision applicable to both ss. 74 and 78 of the CJA. A judgment shall be pronounced in open court even if a judge is absent so long as the coram is substantively constituted (s. 74) or is deemed validly constituted (s. 78). Thus, whether it is the full coram or a duly deemed constituted coram, r. 63 is the procedure on how such judgment of the panel is to be delivered. 'Absence' in r. 63 must therefore be construed to mean mere physical absence and as such, so long as the substantive coram of the court is validly and legally constituted, or deemed to be validly and legally constituted at the time the judgment is delivered, the judgment may be pronounced in the physical absence of that judge by another judge or a Registrar. This conclusion is supported by the *dictum* of Yong Pung How CJ in *Ramachandran* (*supra*) referring to the judgment of Bose J in *Surendra* (*supra*), as follows:

> [5] … Therefore, any judge who delivers a judgment or causes it to be delivered by a brother judge must be in existence as a proper member of the court at the moment of delivery.

[74] Ultimately, in an appellate court setting, the judgment delivered by the judge which has been read and agreed upon by the other existing judges in the panel is the judgment of the court. It not solely his or her judgment alone once it is delivered or read out in open court. Thus, so long as the remaining members composing the court remain in legal existence, there is no impediment to the judgment being delivered under r. 63 of the RFC 1995. In this regard, we are also persuaded by the judgment of this court in *The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik Syed Mohamed & Anor* [2008] 1 LNS 100; [2008] 5 MLJ 469 ('*Syed Kechik*') which arrived at a similar conclusion on its construction of the equipollent provision of r. 63 of the RFC in the Rules of the Court of Appeal 1994 and s. 42 of the CJA (*in pari materia* with s. 78).

[75] It therefore follows that we are not persuaded by Mr Ling's argument. Azahar Mohamed FCJ sitting alone to read out the judgment of Raus Sharif CJ is justified under r. 63. The four other judges in the panel still legally existed when the decision was delivered. As such, there is no legal incapacity affecting the coram to bring into effect s. 78(1) of the CJA 1964. We therefore find no merit in Mr Ling's argument that there was coram failure by the delivery of the judgment by Azahar Mohamed FCJ sitting alone. This brings us to Dato' Loh's submission.

[76] Dato' Loh's argument is threefold. He argued that firstly, the Federal Court did not have jurisdiction under s. 96(a) of the CJA 1964 to make the decision. Secondly, there was a breach of natural justice as the applicants were not heard on certain matters which learned counsel argued were not in issue in the courts below. And thirdly, the decision was erroneous.

[77] Before delving into these allegations, we think it is important to first restate the basic tenets of a r. 137 of the RFC review motion. This is very adequately summed up in the words of Abdul Hamid Mohamad CJ in *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumimoto Insurance (Malaysia) Bhd* [2008] 6 CLJ 1 ('*Paper Mills*'), as follows:

> [4] In an application for a review by this court of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made. Only if it does, that the court reviews its own earlier judgment. Under no circumstances should the court position itself as if it were hearing an appeal and decide the case as such. In other words, it is not for the court to consider whether this court had or had not made a correct decision on the facts. That is a matter of opinion. Even on the issue of law, it is not for this court to determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion. An occasion that I can think of where this court may review its own judgment in the same case on question of law is where the court had applied a statutory provision that has been repealed. I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had disagreed with the court's earlier judgments. If a party is dissatisfied with a judgment of this court that does not follow the court's own earlier judgments, the matter may be taken up in another appeal in a similar case. That is what is usually called "revisiting". Certainly, it should not be taken up in the same case by way of a review. That had been the practice of this court all these years and it should remain so. Otherwise, there will be no end to litigation. A review may lead to another review and a further review. This court has so many times warned against such attempts.

[78] The review process is not intended to give the losing litigant a second bite at the proverbial cherry. Motions for review are not meant to operate as another tier of appeal. It is confined to the very specific purpose to prevent a manifest miscarriage of justice. While 'miscarriage of justice' is not an easy phrase to define, the development of our case law makes it abundantly clear that the correctness of a decision of the Federal Court is not, *per se*, a valid reason to seek a review of it. The public policy reason for setting this high threshold is premised on a simple fact that there must be finality to litigation, and if we may add: due respect to the decision of the final court of appeal.

[79] We accept Dato' Loh's general submission that a breach of natural justice is indeed a valid ground of review under r. 137 of the RFC 1995. At least one case supports this assertion (see generally: *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Appeal* [2013] 4 CLJ 901; [2013] 4 MLJ 351 ('*See Teow Chuan*')). And it is trite that natural justice means the right to be heard and the right to an unbiased decision-maker or tribunal.

[80] A case on point which deals specifically with the right to be heard in the context of a r. 137 review motion is *Sabah Forest Industries Sdn Bhd v. UNP Plywood Sdn Bhd* [2010] 3 CLJ 779; [2010] 4 MLJ 483. In a short judgment, Zaki Azmi CJ noted that one of the main complaints by the applicant was that there was a breach of natural justice on account of the panel not having heard parties on the essential points of the decision. After having perused the authorities on the importance of finality to litigation, the learned Chief Justice remarked, as follows:

> [9] Having read their written submission, having heard the applicant and having perused through the reasons given by the Federal Court, I find no reason to allow this application. In my opinion, the two issues raised by the applicant in this case do not warrant this court to invoke r. 137 of the Rules of the Federal Court 1995. The reasoning given by this court in the appeal proper is in my opinion a sound reasoning. No injustice or abuse of the process of the court has been occasioned.
>
> [10] I also find no necessity to delve into the issues in minute detail in this leave for review application.

[81] The *ratio* gleaned from the case is that a subsequent panel of the court need not have to examine its prior decision with a microscope to confirm that parties were accorded every opportunity to be heard on every microscopic point. Suffice to say that parties are allowed to canvass before the court each point striking to the substance of the case and that the court, in applying its own judicial mind and resources arrives at a decision on the law and on the facts of the case as submitted. It is one thing to say, on one side, that what was submitted was one thing but what was decided was something completely different and on the other, that while addressing the main issues (such as the leave questions), the court also found the need to address some other issues. Surely, the powers of the Federal Court as the apex court cannot be viewed so narrowly as to exist in a vacuum or be altogether pigeonholed into specific boxes only to be examined later under a magnifying glass whether such decision strayed from the confines of the perimeters so artificially established.

[82] Indeed, that has never been the case with our law on the jurisdiction of the Federal Court. As the court observed in *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd & Another Appeal* [2004] 2 CLJ 265; [2005] 3 MLJ 97:

> [31] … Although this court should give leave sparingly, once leave is granted, it is not bound hand and foot to limit itself to the framed issues. It may deal with any matter which it considers relevant for the purpose of doing complete justice according to the substantial merits of a particular case.

[83] The above case and our general discussion on the right to be heard is also our answer to Dato' Loh's submission on s. 96(a) of the CJA 1964 in respect of how the Federal Court is said to have addressed issues which were not directly canvassed in the courts below.

[84] We have perused the judgment of the Federal Court dated 9 July 2018 and we find no reasons for review. Five very lengthy leave questions were framed and the court considered them and dealt with them accordingly. We are therefore not persuaded by the contentions of Dato' Loh. It is our view that the Yong Tshu Khin motions do not cross the threshold of review under r. 137 of the RFC and they are accordingly dismissed with costs.

Tan Boon Lee's Motion

[85] The Federal Court panel which heard the appeal comprised Raus Sharif CJ, Zulkefli Ahmad Makinudin PCA, Richard Malanjum CJSS, Aziah Ali FCJ and Prasad Sandosham Abraham FCJ. The High Court and the Court of Appeal concurrently held that the applicant is not a vexatious litigant. However, in a decision dated 26 September 2017, this court reversed the said concurrent findings and in doing so, declared the applicant a vexatious litigant.

[86] The applicant complained that a breach of natural justice has been occasioned on account that the Federal Court did not provide written grounds of judgment. Apart from citing *See Teow Chuan (supra*) for the general proposition that a breach of natural justice is a ground for review, the applicant has not referenced any other authority which suggests that the failure to provide grounds of judgment *per se* constitutes such a breach.

[87] Mr Ramkarpal's argument on the facts was that the Federal Court should have provided reasons for its decision to reverse the concurrent decisions of the High Court and the Court of Appeal. Further, leave to appeal to the Federal Court was allowed indicating that the appeal was of public importance. Learned counsel submitted that surely, grounded on these facts, the court should have been minded to provide written reasons for its decision.

[88] In *English v. Emery Reimbold & Strick Ltd* [2002] 3 All ER 385 ('*English*'), Lord Phillips MR remarked as follows:

> [15] There is a general recognition in the common law jurisdictions that it is desirable for judges to give reasons for their decisions, although it is not universally accepted that this is a mandatory requirement – 'There is no invariable rule established by New Zealand case law that Courts must give reasons for their decisions' (see *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at 565 (para 75) per Elias CJ).

[89] The above passage was cited with approval in at least two decisions of this court (see *Syed Kechik* (*supra*), and in *Lim Lek Yan @ Lim Teck Yan v. Yayasan Melaka* [2009] 4 CLJ 665; [2010] 1 MLJ 173).

[90] Be that as it may, in *English* (*supra*), Lord Phillips further remarked that the failure to give reasons might amount to a breach of natural justice. His Lordship observed as follows:

> [15] … Reasons are required if decisions are to be acceptable to the parties and to members of the public … the requirement to give reasons concentrates the mind of the judge and it has even been contended that the requirement to give reasons serves a vital function in constraining the judiciary's exercise of power …
>
> [16] We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost.

[91] Lest we be misunderstood, we are not setting a precedent that judges, at any level of the judicial hierarchy, are not required to provide written judgments for the decisions. Cases such as *English*, *Lewis v. Wilson & Horton Ltd* [2000] 3 NZLR 546 (cited in *English*) and *Flannery v. Halifax Estate Agencies Ltd* [2000] 1 WLR 377 (at p. 382) suggest that the extent of the duty to give reasons depends on the subject-matter as well as the facts and circumstances of each and every case.

[92] In terms of subject matter, it is settled judicial practice of this court that it does not typically give written reasons for the dismissal or the grant of leave applications (see generally the judgment of the Federal Court in *Chan Boi Loi v. Public Bank Bhd And Another Application* [2009] 6 CLJ 81; [2011] 1 MLJ 478).

[93] In terms of facts and circumstances and without being prescriptive, the obligation to give reasons may be particularly glaring when it concerns the appreciation and analysis of complex facts, where there is a right of appeal to a higher court or to a court with supervisory jurisdiction.

[94] In the present case, we appreciate that it is less than ideal that the applicant was not provided with written reasons for this court's reversal of the High Court and Court of Appeal's concurrent decisions. Having said that, we must remember that we are here dealing with an application for review. Is there a breach of a right so fundamental and prejudicial that it has occasioned a miscarriage of justice such that the decision delivered on 26 September 2017 should be set aside altogether?

[95] Apart from the fact that the decisions of the lower courts were concurrent and that the Federal Court had reversed it, the applicant has not satisfied us that there has been a substantial miscarriage of justice within the meaning of r. 137. Firstly, the Federal Court is the apex court and its decisions are not subject to appeal. There is therefore no other higher court capable to decide the correctness of the decision. And, as has been said before in our reference to *Paper Mills* (*supra*), the review process is not by any means the forum for such a challenge.

[96] Secondly, we have considered the general submission of counsel for the applicant that the failure to provide reasons given the background of the applicant's case amounts to injustice and that the consequence of such an order declaring him to be a vexatious litigant denies him access to justice. Mr Ramkarpal had further submitted that given the infrequency of such orders, it would be useful to have general guidelines on the issue for the future. With respect, we are unable to accept how these arguments reflect a serious miscarriage of justice.

[97] It is well within the power of the court to declare litigants as vexatious. The applicant was represented by counsel and he had the right to ventilate his arguments. This was done. Even if the court had provided reasons, it would not have changed the fact that the applicant would remain a vexatious litigant without any further right of appeal. And, the fact that the issue was of public importance does not automatically suggest that the failure to explain the decision amounts to a serious injustice to the applicant. Interest of justice also means justice for the respondent to know that there is finality to litigation.

[98] For the foregoing reasons, we find that no serious miscarriage of justice has been occasioned to the applicant such that the threshold of r. 137 of the RFC 1995 has been met.

[99] Accordingly, we find that Tan Boon Lee's motion is without merit and is thus dismissed with costs.

Tan Wei Hong's Motion

[100] In Tan Wei Hong's motion, the specific complaint against the decision of the Federal Court dated 28 November 2017 is that there was coram failure on account that the Federal Court did not consider at all the leave questions posed in the case. The decision was a unanimous one delivered by a panel consisting of Raus Sharif CJ, Zulkefli Ahmad Makinudin PCA, Ramly Ali FCJ, Zaharah Ibrahim FCJ and Balia Yusof Haji Wahi FCJ. The grounds of judgment delivered post-decision was dated 22 May 2018.

[101] So that it is not said that we misunderstood the motion, we reproduce the relevant part as follows:

> 1. Bahawa perintah Mahkamah Persekutuan bertarikh 28hb November, 2017 dalam Rayuan Sivil No 02(f)-29-03/2017, Rayuan Sivil 01(f)-14-05/2017(W) dan Rayuan Sivil No 01(f)-15-05/2017(W) (selepas ini dirujuk sebagai 'rayuan-rayuan Mahkamah Persekutuan tersebut') yang menolak rayuan-rayuan kesemua pihak terhadap keputusan Mahkamah Rayuan masing-masing, disemak dan diketepikan oleh Mahkamah yang Mulia ini seakibat kegagalan koram Mahkamah Persekutuan ('coram failure') dan Rayuan-rayuan Mahkamah Persekutuan tersebut didengar semula oleh koram Mahkamah Persekutuan yang lain; dan
>
> 2. Apa jua perintah dan/atau relif lain yang difikirkan patut dan sesuai oleh Mahkamah yang Mulia ini.

[102] Those are the general prayers. One of the reasons given for coram failure is stated in para. (c) of the grounds of the motion, as follows:

> Koram Mahkamah Persekutuan tersebut tidak langsung mempertimbangkan soalan yang dibenarkan berkenaan Rayuan Sivil No 02(f)-29-03/2017(W), sebelum menolak rayuan tersebut, sepertimana dapat dilihat daripada alasan penghakiman;

[103] With respect, we cannot see how such an allegation amounts to coram failure. Be that as it may, Ms Sitpah, counsel for the applicants argued that grave prejudice has been occasioned to the applicants by the failure of this court to answer the sole leave question posed in that case.

[104] It is a trite practice of this court that even where this court had granted leave, a subsequent panel of this court need not answer the leave question or questions posed if the circumstances do not require it. Support for this proposition is found in the judgment of this court in *UOL Credit Sdn Bhd v. Dato' Vijay Kumar Natarajan* [2010] 1 CLJ 557; [2018] Supp MLJ 439:

> [4] It is now settled that the grant of leave upon a question does not impose a duty on this court to answer it. Put differently, there is no legitimate expectation in an appellant by the mere grant of leave that the question posed will be answered. There are several cases that make this plain.

[105] We acknowledge that the facts of that case were different from the present one. There, the appellant had filed a motion for leave to appeal to the Federal Court which this court granted. The respondent then filed a motion to set aside the grant of leave. The appeal and the respondent's motion eventually came up for hearing at which stage the respondent sought to amend its motion to the effect that the court ought not to answer the leave question. The amendment was unopposed. This court then proceeded to hear the motion and upon the close of argument on the motion, the Federal Court dismissed the appeal. In a motion for review against that decision, this court held that there was no procedural unfairness and that it remains open to the opposing party to object to the grant of leave even at the appeal stage.

[106] The wider *ratio* posited in the case is that just because leave is granted does not mean that the Federal Court is always obliged to answer it. This is discernible from the court's approval of its earlier decision in *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 CLJ 349; [2003] 3 MLJ 257. In that case, leave to appeal had been granted but the court, when disposing of the appeal, held that it was unnecessary to answer the leave question on account of the appeal itself being fact-sensitive.

[107] Other subsequent cases of this court have upheld this judicial practice whereby even if leave is granted, the court can, upon considering the merits of the appeal, decide that the appeal being fact-sensitive, does not warrant its

A answer to the leave question or questions (see *Clariant Masterbatches (M) Sdn Bhd v. Prestige Dynamics Industries Sdn Bhd* [2019] 5 CLJ 835; [2019] 3 MLJ 701). It may also be the case that the court elects not to answer the question because upon considering the merits of the appeal, the facts of the case do not actually relate to the questions of law so specifically framed
B (see *Ng Chin Tai & Anor v. Ananda Kumar Krishnan* [2019] 10 CLJ 766; [2020] 1 MLJ 16).

[108] Ms Sitpah took us through the grounds of judgment of this court and examined it as though the judgment was on appeal. As the cases cited have shown, it was the prerogative of the court to decide, on the facts, whether
C the leave question warranted an answer. We have perused the judgment for ourselves. The Federal Court was essentially dealing with appeals against decisions of the High Court and the Court of Appeal in respect of a striking out application. Such an interlocutory appeal naturally concerns the issue of discretion of the lower courts and necessarily involves issues of fact. It was
D the prerogative of the court not to answer or consider the leave question.

[109] As such, we fail to see how the applicants in Tan Wei Hong's motion have suffered prejudice in the way Ms Sitpah suggests much less that the decision was bad on account of coram failure. Accordingly, we find the motion to be bereft of any merit and it is dismissed with costs.

E

Conclusion

[110] To conclude, it is our view that the common point in all review motions alleging coram failure is without merit. The appointments of the two judges and their decisions are both saved by the *de facto* doctrine. Further,
F upon our interpretation of the CJA 1964 and our consideration of decided cases, it is our view that the specific points alleging coram failure, breach of natural justice, or general injustice in the respective sets of motions, are also without merit.

[111] It follows that all the seven review motions are unanimously dismissed
G with costs.

H

I